Supreme Court, U.S.
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No. 96-1734

In The

Supreme Court of the United States

October Term, 1996

STATE OF ARIZONA,

Petitioner,

v.

EDWARD PALENKAS,

Respondent.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Police, investigating a fatal hit and run accident, suspected that Palenkas' car was involved. Prior to trial, Palenkas filed a motion in limine, asking the court to preclude evidence that he would not agree to a warrantless search by police without first speaking with his attorney. He argued constitutional grounds, lack of relevance, and unfair prejudice. The state conceded the motion, and the trial court granted it. The state then introduced at trial evidence pertaining to the precluded topics, and urged that the evidence showed Palenkas' guilt in closing argument.

1. Did the Arizona court of appeals correctly grant Palenkas a new trial for the prosecution's insinuation of guilt from his request to speak with counsel and invocation of his right to refuse a warrantless search?

2. Did the court of appeals correctly hold the prosecution to its stipulation and trial court order, under state law, in granting Palenkas a new trial?

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STATEMENT OF THE CASE[1]

A. FACTS

On April 12, 1994, Palenkas and his friend Robert Davis ate dinner at a restaurant in Scottsdale, Arizona. They each sipped two alcoholic drinks along with their meals. The bartender observed nothing unusual about Palenkas' demeanor. T 6/21/95 79-82[2] As Palenkas left the restaurant, he slipped in an area where both employees and customers had tripped before. *Id.* The bartender, concerned about Ed's condition, spoke with him and offered to give Palenkas a ride home, which Palenkas declined. After assuring himself that Palenkas was fine, the bartender watched Palenkas leave the restaurant, going across an uneven patio and up a set of stairs; Palenkas was normal after the slip. *Id.* 83-89. Two other restaurant employees also saw the slip.

At about the time Palenkas and Davis traveled toward home, David "Ted" Turner and his 11 year old son, Kipp, were walking home from a video store. Their path along the shoulder of the road (there was no sidewalk) was blocked, by a trench extending away into the desert and by two large dirt piles. The piles, which were in place for only 24 hours from a gas company project, and the trench behind them forced the Turners to walk onto the asphalt of the roadway itself. After passing the piles, Ted returned to the shoulder of the road. Kipp, behind him, continued on the asphalt about 12" from the

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[1] All parties appear in the caption on the cover page.

[2] "T" refers to a transcript from the trial court proceedings; "item," referred to *infra*, specifies a document from the record on appeal.

pavement edge. TT 6/20/95 51, 6/26/95 298-300, 6/28/95 14, 33. (Contrary to the implication in the state's petition at 4, it was uncontested that Kipp was walking on the pavement at the time of the accident.)

Turner saw a car approaching, one which he claimed was driving erratically. The car struck Kipp on the roadway and proceeded ahead without braking or stopping, giving no sign that the driver was aware that anything had happened. Turner described the car that struck Kipp as a dark, American 4-door sedan.

Due to Kipp's position, the instantaneousness of the event and other factors, the accident was a terrible mischance. The state's accident reconstructionist explained that the whole event, from Kipp striking the car to landing, took only 1.27 seconds. Kipp's body struck the extreme right front corner of the car, at the blinker-headlight assembly on the front and on the top near the right edge of the vehicle. The span of time between the initial impact and Kipp's head hitting the top right side of the car was half an eye-blink. Taking into account perception-reaction time, the reconstructionist established that Palenkas might have seen the boy only if he had been looking in the right corner of the windshield and through the right passenger window. An eminent lighting expert for the defense explained that because of the lighting conditions extant at the time of the accident, Palenkas could not have seen the boy at all.

Palenkas heard the report of the accident on the news. He called Davis on the morning of April 13th. He wondered, "We came through there approximately the same time (as the accident), and it might have been me,"

or "it could have been me that hit the boy." T 6/20/95 146. Davis specifically denied that he understood the statement to be an admission to the crime, contrary to the statement in the petition at 5.

Debris left from the vehicle was evaluated by the police. It belonged to a white 1984 or newer Rolls Royce or Bentley. Detectives from the Scottsdale Police Department obtained a list of owners, and began going door to door on April 13th. The fourth house was the Palenkas home; he invited the detectives in. They told him what they were there for, asked to see his car, and asked what color his car was. Palenkas told them the car was white, but declined to let them see it without first speaking with his attorney, whom he was waiting to hear from.

Eventually, Palenkas was indicted for one count of reckless manslaughter and one count of leaving the scene of a fatal accident.

B. PROCEDURAL HISTORY

The state's petition omits a critical aspect of the trial court procedural history, in violation of Rule 14 (1)(g)(i). Prior to trial, Palenkas filed a motion to preclude admission of evidence pertaining to two, interrelated topics: his invocation of his right to refuse to submit to a warrantless search, and his request to speak with counsel. Item on Record on Appeal 56; petition appendix A7-8. The motion sought preclusion of this evidence on constitutional and relevance grounds, and because any probative value was outweighed by unfair prejudice. The state conceded the motion in writing. Item 70. At oral argument, the

prosecutor said, "Obviously, we've conceded those issues." T 3/10/95 5. The judge granted the motions. *Id.*

Despite its concession, the state introduced evidence of Palenkas' request to speak with counsel and his right to refuse a warrantless search into evidence, through the testimony of the detectives in the case-in-chief. As described in the opinion of the Arizona court of appeals, the prosecutor then argued at length and vigorously that these two interrelated statements were evidence of guilt.

The state also omits relevant appellate court procedural history. In its brief before the court of appeals, the state contended one thing regarding Palenkas' desire to speak with counsel: that the right to counsel under the 6th Amendment had not attached, so there was no constitutional violation entitling him to a new trial. The prosecution did not address the relevance-probative value arguments (which the state had previously conceded) raised by the defense in its briefs. Nor did the state address Palenkas' relevance-probative value arguments regarding the search issue on appeal.

The court of appeals concluded that the admission of the evidence, combined with the argument, entitled Palenkas to a new trial. The court did so because the prosecution's conduct violated the trial judge's order (to which the state stipulated), and for violation of due process. Petition appendix A27-28. The appellate court characterized the prosecution's conduct as "egregious" and "highly improper." *Id.* A27. The court also found – in light of Palenkas' state of mind as central to his defense, and the circumstantial and conflicting evidence – that the error was not harmless.

REASONS WHY THE PETITION SHOULD BE DENIED

There are four reasons for denying the writ: (a) a unanimity of authority and the correctness of that prevailing view; (b) the inability, on the facts presented, to disentangle the constitutional questions posed by the state from non-constitutional issues of state law, (c) the court of appeals, in ordering a new trial for violation of the order pertaining to the motion in limine, relied upon an adequate and independent state ground, and, (d) the state's confessed reversible error, under state law, by failing to address the relevance-probative value arguments in the courts below.

A. THE UNIFORM RULE – CONDEMNING USE OF ONE'S REQUEST TO SPEAK WITH COUNSEL AND OF ONE'S RIGHT TO REFUSE A WARRANTLESS SEARCH AS EVIDENCE OF GUILT – IS CORRECT

As the state concedes, no split of authority exists on the distasteful tactic of using, as evidence of guilt, a defendant's request to speak with counsel or his invocation of the right to refuse a warrantless search. The federal courts of appeal and the state appellant courts universally condemn the practice, although sometimes declining to reverse under a harmless error analysis. *See* petition at 9-10; petition appendix at A21-22 (collecting cases).

These courts reach the result for two reasons. First, they logically employ the teaching of *Doyle v. Ohio*, 427 U.S. 610 (1976) to the search and counsel issues. Second, they correctly apply *United States v. Hale*, 422 U.S. 71 (1975). *Hale* held that the probative value of pre-trial

silence was outweighed by its unfair prejudice. It therefore granted a new trial on evidentiary – rather than constitutional – grounds. *Id.* at 73. "If the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded." *Id.* at 75; *see also State v. Scott*, 27 Ariz. App. 361, 362, 555 P.2d 118 (App. 1976) ("Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice"); *Silvernail v. State*, 777 P.2d 1169, 1174 (Alaska Ct. App. 1989) ("We conclude that the trial court's failure to balance probative value [of pre-arrest silence] against prejudicial impact amounted to plain error").

The lack of probative value and danger of unfair prejudice are as important considerations for the desire to speak with counsel as they are for pre-trial silence. *Arthur v. State*, 575 S.2d 1165, 1179 (Ala. Crim. App. 1990), *cert. denied*, 575 S.2d 1191 (Ala 1991) ("Even assuming that our cited authorities do erroneously rest their holdings on the Sixth Amendment, we still find them to be authoritative. They illustrate the intense distaste that courts have for . . . testimony and comments [that representation by an attorney creates an inference of guilt]"); *Commonwealth v. Person*, 400 Mass. 136, 141, 508 N.E.2d 88 (1987); *quoting Zemina v. Solem*, 438 F.Supp. 455, 466 (D.S.D. 1977), *aff'd*, 573 F.2d 1027 (8th Cir. 1978) ("A defendant's decision to consult an attorney is not probative in the least of guilt or innocence, and a prosecutor may not 'imply that only guilty people contact their attorneys' ").

They pertain equally to the right to refuse a warrantless search. *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) ("Because the right to refuse entry when the officer does not have a warrant is equally available to the innocent and the guilty, just as is the right to remain silent, the refusal is as 'ambiguous' as the silence was held to be in [*Hale*]"); *State v. Wilson*, 185 Ariz. 254, 258, 914 P.2d 1346 (App. 1996) (just as it is generally impermissible for a prosecutor to comment on a defendant's right to silence, "so it is generally impermissible to use a defendant's invocation of Fourth Amendment protections against him").

The cases, cited in the opinion of the court of appeals and above, show that the state and federal courts are not mis-applying the law. As there is no mistake in applying the law, there is no reason justifying review by this Court.

B. THE FEDERAL CONSTITUTIONAL ISSUE AND THE STATE EVIDENTIARY ISSUE ARE INEXTRICABLY TANGLED

The counsel issue and the search issue are factually indivisible because the latter flowed directly from the former. (Thus, it is irrelevant that the counsel issue does not arise under the 6th amendment.) The issues are also legally linked, presenting closely related constitutional and evidentiary concepts.

> The underlying rationale of the constitutional bar against admitting evidence of a defendant's post-arrest silence is the concern that such evidence is only minimally probative, while possessing a high potential for prejudice to the defendant's case. . . . Thus, Silvernail's fifth

> amendment objection not only flagged the need for caution in admitting the disputed line of inquiry, but also invoked the underlying policies that are involved in the evidentiary claim that he now asserts on appeal.

Silvernail, 777 P.2d at 1174. While Arizona has not specifically adopted an evidentiary rule precluding admission of a defendant's request to speak with counsel, it has adopted the *Hale* analysis for fifth amendment claims. *State v. Scott*. It has also approved, in *dictum*, the same rule regarding the search issue. *State v. Wilson*. Thus, there exists an adequate non-federal ground for the result achieved by the Arizona court of appeals. This is yet another basis for denying review. R. Stern, et al., *Supreme Court Practice* § 4.25 at 207-208 (7th Ed. 1993).

C. THE COURT OF APPEALS ALSO RESTED ITS CONCLUSION ON AN ADEQUATE AND INDEPENDENT STATE GROUND

A third reason to deny review is that there is an adequate, independent state ground upon which the opinion of the court of appeals rests. The defense moved in limine to preclude evidence of the search and counsel issues. The state stipulated to the motion, and the trial court granted it. In summarizing the law on these issues and the facts of this case, the court of appeals held:

> We conclude that these comments were highly improper in at least two respects. **First, they directly violated the *in limine* order.** Second, they violated defendant's due process rights to a

> fair trial by creating an inference that defendant's invocation of constitutional rights was evidence of his guilt.

State v. Palenkas, 229 Ariz. Adv. Rep. 18, 24 (App., 11/05/96), petition appendix at A27-28 (emphasis added). This holding, dependent as it is upon the state law of stipulation, motion practice and trial practice, is an adequate and independent state ground for affirming the action by the court of appeals. It is one more reason for denying review. *Supreme Court Practice* § 3.24 at 152-158.

D. UNDER ARIZONA LAW, THE STATE HAS CONFESSED TO REVERSIBLE ERROR

Palenkas moved in limine to preclude evidence pertaining to the search and counsel issues. The reasons included lack of relevance and unfair prejudice under Rules 401 and 403, Ariz. R. Evid. The state stipulated to the motion.

On appeal, Palenkas argued that these were grounds, in addition to the constitutional arguments, to grant a new trial. The state did not respond to the evidentiary arguments for either issue. When an appellant raises debatable issues, the appellee's failure to respond to them generally constitutes a confession of reversible error. *Hecla Mining Co. v. Industrial Com'n.*, 119 Ariz. 313, 314, 580 P.2d 774 (App. 1978). For this additional state ground, review by this Court should be declined.

CONCLUSION

The prosecution in this case stipulated that it would not use Palenkas' request to speak with counsel and his right to refuse a warrantless search as evidence of guilt. It then did so, in violation of the stipulation and the trial court order. The court of appeals determined that a new trial was necessary to remedy such "egregious" and "highly improper" conduct. That decision was the logical and just result.

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